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8 **COURT ORDER DATED JANUARY 22, 2010**  
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R. DARLENE PINO  
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1                   UNITED STATES DISTRICT COURT  
2                   MIDDLE DISTRICT OF GEORGIA  
3                   ALBANY DIVISION

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5  
6                   CASE NO. 1:07-CR-18 (WLS-RLH)

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9  
10                  UNITED STATES OF AMERICA

11                 Plaintiff,

12                 Vs.

13                 FRANK RUSSELL MCCOY

14                 Defendant.

15

16                   BENCH TRIAL

17                 BEFORE THE HONORABLE W. LOUIS SANDS  
18                 UNITED STATES DISTRICT COURT JUDGE

19

20                 DATE:                           JANUARY 13, 2010

21                 LOCATION:                        ALBANY, GEORGIA

22                 COURT REPORTER:                   R. DARLENE PINO

23

24                 APPEARANCES:

25                 FOR THE PLAINTIFF:                JAMES N. CRANE  
   CHANTEL L. FEBUS

                     FOR THE DEFENDANT:                CYNTHIA W. ROSEBERRY  
   MORAD FAKHIMI

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1                   THE COURT: Good morning.

2                   COUNSEL COLLECTIVELY: Good morning.

3                   THE COURT: All right. I believe we were in  
4                   direct examination of a witness. If the witness will  
5                   return to the stand.

6                   All right. You may continue, Mr. Fakhimi.

7                   MR. FAKHIMI: Thank you, Judge.

8                   **GARY RICHARDSON, DEFENSE WITNESS**

9                   **DIRECT EXAMINATION, CONTINUED**

10                  **BY MR. FAKHIMI:**

11                  Q         Professor, yesterday we left off with a discussion  
12                  that immediately followed your statement of your  
13                  conclusion that this body of work as a whole has literary  
14                  value and that the literary effort employed by the author  
15                  is serious. Can you repeat for us why you reached this  
16                  conclusion?

17                  A         Well, the totality of the work, the entire 240  
18                  stories, suggested to me that the variety of approaches,  
19                  despite the general focus on one or two standard plots,  
20                  suggests an attempt to bring to bear literary devices,  
21                  mechanisms, forms in such a way as to make a serious  
22                  effort at speaking to the topics in a way that reflects  
23                  serious thought and serious artistry.

24                  I guess I would have to note that for something to be  
25                  constituted as literature, it does not necessarily have to

1       be on equivalent with Shakespeare or Dickens or anyone  
2       else. If that were the case, Barnes and Noble would have  
3       to essentially sweep its shelves and take most of what we  
4       think of as contemporary literature off its shelves.

5           So does it have serious intent? Yes, it does. Is  
6       the matter that it concerns or addresses serious? Yes, it  
7       is. And therefore, it has serious value from the  
8       perspective of those of us who study literature.

9       Q       Okay. Now do you recall reading and analyzing  
10      specifically the story "\*\*\*\*\*"?

11      A       Yes.

12      Q       I believe the full title is a bit longer. Raping  
13      Little Suzy or something of the sort.

14           If one were to look at an isolated passage from that  
15       story and strip it from the rest of the content of the  
16       story, a single paragraph, maybe two, is it possible to  
17       glean literary value just by looking at that passage?

18      A       Probably --

19      Q       I'm sorry. Let me rephrase the questions.

20      A       Sure.

21      Q       Is it possible to condemn the entire story by reading  
22       a single passage?

23      A       Yes.

24      Q       So by reading a single passage, you can say that an  
25       entire story does not have value?

1 A No. What you can say is that the passage has no  
2 value.

3 Q I see. So to determine the value of a complete  
4 story, you would essentially need to read the entire  
5 story?

6 A Yes.

7 Q What are your impressions of that story as to  
8 literary value?

9 A It is a story that on its face is extremely  
10 disturbing. I found much of what Mr. McCoy wrote  
11 personally disturbing. It did not interfere with my  
12 assessment.

13 The story, itself, is predicated upon an inversion of  
14 a biological reality. That reality is that all of us come  
15 into existence through the sexual act. This act -- This  
16 particular story explores whether or not, on the one hand,  
17 sex might be used in a violent way, and indeed it is used  
18 in a violent way, a chemically induced kind of  
19 hyperviolence. On the other hand, ultimately, it is only  
20 through that sexual act that Suzy and her father are  
21 saved.

22 Obviously this is a kind of fantasy, but it does not  
23 necessarily therefore mean that it is -- it does not  
24 contain serious literary value. I mean, I deal with  
25 literature all the time that is violent in the extreme.

1       In King Lear, Gloucester has his eyes gouged out on stage  
2       for the audience to see.

3           If violence is to be used as the means of saying  
4       something does not have literary value, we've got to get  
5       rid of most or much of literature any way.

6   Q     Absolutely. Now, you mentioned chemically induced  
7       violence. Is this particular story a work of science  
8       fiction?

9   A     It would be -- Yes, to my mind, it sort of hinges  
10      more toward the science fiction field than the fantasy  
11      field.

12           The use of nanobots suggests a kind of fantastic  
13      world. This, in some senses, is a version of  
14      postapocalyptic fiction that has been very popular in the  
15      20th Century. PD James, whose best known as a detective  
16      novelist but a very serious novelist, wrote a book called  
17      "Children Of Men", which many people have seen an  
18      adaptation of, which in some senses takes the sort of  
19      opposite view which is that the problem is sterility, that  
20      the human race is dying out because of sterility.

21           In this case, sex is both generative, which it is not  
22      in PD James' work, and murderous and ultimately  
23      generative, which is an intriguing concept.

24   Q     Now, Professor, you mentioned something earlier I  
25      want to explore a bit, that, in your view, Mr. McCoy's

1 subject matter in some or all of these stories is  
2 disturbing. Does disturbing subject matter in any way  
3 affect literary value? In other words, if something is  
4 disturbing, would that, per se, detract from literary  
5 value that may manifest itself through use of narrative  
6 devices, point of view, so on and so forth?

7 A If I looked at the broad and long history of  
8 literature, I would have to conclude that initially it may  
9 well. My colleagues in the French department might well  
10 choose to teach the Marquis de Sade. The very nature of  
11 his work wound him up in an insane asylum because the  
12 subject matter of the work was sufficiently disturbing to  
13 the contemporary audience.

14 And therefore, I have become, and most of my  
15 colleagues in literary, have become wary of saying that  
16 because of a particular kind of presentation, a piece of  
17 literature -- a work could be deemed nonliterary because  
18 of the existence of material that's troubling to any of  
19 our sensibilities or moral compasses, for that matter.

20 Q Yet, Marquis de Sade's work is now presently viewed  
21 as being imbued with all manner of literary value. Is  
22 that correct?

23 A Correct.

24 Q All right. Professor, I'm going to read you the name  
25 of 18 individual stories out of this body of work. I

1 would like to ask you a question about the 18. But first,  
2 if you could verify that you have, in fact, read these 18  
3 along with the rest. You have already verified that you  
4 read everything.

5 But these 18 particularly, the file names would be

6 \*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\* \* \*\*  
7 \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\*  
8 \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*  
9 \*\*\*\*\* \* \*\*\* \* \*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\* \* \*\*\*\*\*  
10 \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\*\*\* \* \*\*\* \* \*\*\*\*\*  
11 \*\*\*\*\* \* \*\*\* \* \*\*\*\*\* \* \*\*\*\*\*

12 Are you familiar with these 18, Professor?

13 A Yes.

14 Q If you were to discuss the relative literary value of  
15 these 18 in comparison with the literary value of the  
16 larger body of work that you reviewed, the 240 stories,  
17 how would you say that that would compare?

18 A The large number of very short pieces in that  
19 particular list makes it difficult for people to evaluate  
20 the literary quality of the material.

21 Narrative operates primarily through character  
22 development, in our increasing awareness of the complexity  
23 of motivation and psychology within characters. So every  
24 time you choose a very short piece as a selection, it  
25 becomes increasingly difficult to see that.

1           Let me, as a point of comparison, I'm teaching a  
2 course in German fiction in this particular semester. The  
3 anthology that I have has only one story in it out of 70  
4 that is under five pages printed in this anthology.

5           So if you look at the short quality of the short  
6 length of some of these stories, it would be difficult to  
7 see that. The longer ones tend to validate, more  
8 obviously, my observation about the literary -- the  
9 specifically literary as opposed to political seriousness  
10 of the works.

11          The shorter pieces I would tend to move toward the  
12 political end of the spectrum that I talked about  
13 yesterday, which has a value in and of itself, but it is  
14 not necessarily an aesthetic value. But it does not  
15 detract because it is within the political realm from the  
16 seriousness of the literary value.

17 Q          Professor, to the best of your memory, I know the  
18 review you conducted in this case of the materials was  
19 voluminous, but from what you remember about these 18  
20 particular stories, what observations can you draw as to  
21 the literary value and the literary effort of these 18 in  
22 particular, as short as they may be?

23 A          Most of them operate on an interesting principle of  
24 inversion, usually of expectations among the readers or  
25 the characters themselves. One of the stories, for

1 example, hinges upon the concept of a father instructing  
2 his child in the facts of life. Most of us, most readers,  
3 would expect this to generate a kind of conversation where  
4 do -- how are babies made, where do they come from, what  
5 is the biology. The father in this story, of course, has  
6 intercourse with his daughter as a kind of model of  
7 education in which, ironically enough, it hinges on  
8 demonstration.

9 This is not particularly a story that is long. In  
10 fact, it is relatively short. But it does show a kind of  
11 use of inversion, which is a technique that oftentimes we  
12 associate with literature, and expectations.

13 There's also in the same story, a conflict at the  
14 linguistic level between the husband and wife. The wife  
15 insists that the husband make sure to instruct the  
16 daughter. The daughter has an entirely different  
17 viewpoint about what she wishes to talk about or have  
18 happen to her. And the father complies with the  
19 daughter's wishes as opposed to the mother's wishes, and  
20 therefore, there's an inversion of the mother's  
21 expectations within the same story.

22 And part of the humor of the story is the sort of  
23 complicit or the complicity of the daughter and father in  
24 creating a kind of little conspiracy against the mother.

25 Q So, okay. Professor, again to focus your attention

1 back on the large body of work as a whole, all of the  
2 stories that you reviewed --

3 A Right.

4 Q -- can you discuss for us instances of the use of  
5 parody or spoof that you made observations about?

6 A Yes. Oftentimes in Mr. McCoy's work, he will use  
7 some recognizable literary form. As I mentioned  
8 yesterday, things like folk tales, for example, Goldilocks  
9 or the Big Bad Wolf, and will parody that and will spoof  
10 the very form of that work.

11 He also tends to pull his readers into his stories  
12 and establish certain kinds of expectations as in the  
13 story that I was just mentioning a moment ago, only to  
14 invert those and thereby parody the expectations of the  
15 audience, thinking that they know what is going to happen  
16 when, in fact, they don't.

17 Q Would you say that parody and spoof are pervasive  
18 through this body of work or that they appear sporadically  
19 here and there?

20 A I would say that they tend to -- formal parodies tend  
21 to appear relatively infrequently. They are there and in  
22 the totality of the work it becomes more obvious; however,  
23 it is not necessarily pervasive in that sense.

24 Q Where would you see this sort of tactic in other  
25 recognized literature?

1 A Well, in an area that I'm most familiar with, the  
2 18th Century, what we often have is things called mock  
3 epics in which the conventions of epics are inverted.

4 In a poem like "Mac Flecknoe" by John Dryden, the  
5 17th Century poet. He actually uses the conventions of  
6 the death of the hero and inverts those by having the  
7 hero, who is dying, not a great warrior, but a hack poet,  
8 whose succession is not to be biological but is to be  
9 based upon the inferior poetic ability of another poet who  
10 will succeed his crown as the worst poet in London.

11 Alexander Pope, in the same period, made a career, in  
12 some senses, of not only translating things like the  
13 "Aeneid", but also, you know, poem like the "Rape of The  
14 Lock" -- excuse me -- a poem like the "Rape of The Lock",  
15 inverting those conversions to parody, social mores of his  
16 contemporaries.

17 In that particular case, he gives all the trappings  
18 of an epic poem to an incident between two Catholic  
19 families in which a young woman's curl has been cut off,  
20 and the families are at odds.

21 And this continues. In some senses -- I mean  
22 arguments are made that Huckleberry Finn, by Mark Twain,  
23 is in some senses a parody of the boy conduct books that  
24 are exemplified in something like Tom Sawyer. So this is  
25 a pervasive technique, and it can be turned overtly to

1 politics. Aristophanes comedies, "The Birds" and "The  
2 Wasps" are parodies of comedic conventions in Greek  
3 theatre brought to bear politically on Athenian politics.

4           Would you care for more?

5       Q     I would rather actually ask you, we were just  
6       discussing inversion of expectations of the reader.

7       A     Right.

8       Q     Yesterday we had talked about reader entrapment.

9       A     Right.

10      Q     These two separate devices. Could you explain the  
11       difference between these concepts?

12      A     Reader entrapment takes inversion, which is a  
13       narrative technique, to a new level in which it actually  
14       precipitates, as I talked about, for example in the Swift  
15       illustrations yesterday, takes it to a new level in which  
16       the reader, him or herself, is brought into the tale; but  
17       usually there's a more serious -- rather than merely an  
18       inversion of expectations, there's a more serious project  
19       here.

20           And to be frank, my suspicion, given some of the  
21       prefaces and prologues and epilogues in Mr. McCoy's work,  
22       is that this very event has in some senses proven the  
23       nature of the entrapment that he has set for the legal  
24       authorities.

25      Q     I'm sorry, Professor. This is something you can

1 glean from the literature itself? From the prologues  
2 themselves?

3 A Yes. He has a very strong --

4 THE COURT: Yes.

5 MS. FEBUS: Objection. He's testifying to an  
6 issue of legal entrapment. It's not an issue in this  
7 case. He just mentioned something about the defendant  
8 setting a trap for legal authorities to come and, what,  
9 arrest him? I don't understand.

10 THE COURT: How do you entrap legal authorities?  
11 That's not -- that's not entrapment. If that's what you  
12 are asking for, she's dead right, but I didn't think  
13 that's what you were talking about.

14 MR. FAKHIMI: Your Honor, we're not talking  
15 about entrapment in the legal defense sense of the word.  
16 We're talking about it as a literary technique where the  
17 author entraps his reader.

18 MS. FEBUS: Okay. I understand that, but the  
19 expert, Mr. Richardson, was just testifying to police,  
20 authority being called in, and that part being the  
21 defendant's intent. That's not his testimony that I have  
22 an objection, but that was a statement that he just made.

23 THE COURT: Well, I understand that may be the  
24 statement as made, but I don't think the statement he made  
25 was in the form of entrapment that meets the objection you

1 are making.

2 MR. FAKHIMI: Your Honor, just to avoid any  
3 issue at all, I will withdraw the question and the answer  
4 can be disregarded if that would help the government --

5 THE COURT: All right. That solves that, that's  
6 fine with me.

7 All right. You may ask another question.

8 BY MR. FAKHIMI, CONTINUED:

9 Q Professor, let's talk narrative strategies. There  
10 are different ways to develop a narrative and tell a  
11 story. How many -- Please give some examples of the  
12 different modes and models that this author uses to  
13 deliver his narratives across the body of this work from  
14 one story to another? How many different ways, as far as  
15 your memory recalls, does this man know how to tell  
16 stories?

17 A Well, that question is complicated or has as a kind  
18 of subdivision of it the whole idea of the influence of  
19 point of view on telling a story. So, for example, the  
20 same set of events told from multiple points of view can  
21 result in as many narratives as one might wish. Over the  
22 body of Mr. McCoy's work, much of which deals with sexual  
23 escapades, he utilizes numerous points of view.

24 He also uses numerous forms. As I mentioned before,  
25 he can utilize science fiction, he utilizes folk tales, he

1 utilizes rather traditional romance formulas with very  
2 different kinds of characters involved.

3 I am not sure if I'm actually addressing your  
4 question in a way that you --

5 Q You did. You did.

6 Let me ask you, has he done anything unconventional  
7 in any of these stories, say, for example, to deliver a  
8 narrative strictly through dialogue without having a  
9 narrator's voice at all?

10 A Yes. I mean one of the points of view, and this is  
11 the reason I raise that issue, was that when Ernest  
12 Hemingway burst on the literary scene, one of the  
13 techniques that was most often associated with his work  
14 was the so-called dramatic point of view. There is no  
15 narrator. It is in some senses merely a dialogue between  
16 one -- between at least two and sometimes more people.

17 And at least in two instances in the 18 stories that  
18 were provided, Mr. McCoy deploys this technique as a way  
19 of telling his tale.

20 So, indeed, he does deploy that narrative technique.

21 Q Professor, we'll wrap things up here by speaking  
22 thematically about his works. What themes are explored in  
23 the body of this work as a whole? What overarching themes  
24 do you see?

25 A Well, as I mentioned yesterday, I would probably

1 focus on three interrelated themes and then a kind of  
2 political thematic.

3 The one is the nature of love, a persistent theme in  
4 literature. The difference between love and sexuality,  
5 and the -- not only the nature of sexuality, how we are  
6 disposed to interact sexually with the rest of the world,  
7 but the very nature of that, what's the relationship  
8 between love and sexuality.

9 In addition, the ways in which society in some senses  
10 helps us construct and indeed occasionally coerces us to  
11 relate sexually to the rest of the world and those around  
12 us.

13 In addition to that, I would make the observation  
14 that there's a political theme here that our culture has  
15 become increasingly more repressive in terms of sexual  
16 mores over the last at least 40 years, and Mr. McCoy's  
17 stories seem to insist that that conversation needs to be  
18 reopened with some degree of seriousness, and these  
19 stories seem to be a way to insist upon that.

20 Q So, Professor, I'll just end with asking you, with  
21 regards to this entire body of work, with regards to  
22 narrative strategies and narrative devices, thematic  
23 exploration, the use of language, what is your conclusion  
24 as to the relative literary value or worth of this body of  
25 work?

1 A Under the narrow definition of literary value, it  
2 does have serious literary value.

3 Q Thank you, Professor.

4 MR. FAKHIMI: I have no further questions,  
5 Judge.

6 THE COURT: All right. Cross examination?

7 CROSS-EXAMINATION

8 BY MS. FEBUS:

9 Q Good morning, Mr. Richardson.

10 A Good morning.

11 Q Are you being paid for your testimony today?

12 A Yes.

13 Q What are you being paid?

14 MR. FAKHIMI: Objection, Your Honor, relevance.

15 THE COURT: Well, I think it's a credibility  
16 issue. It always is, isn't it?

17 MR. FAKHIMI: All right.

18 MS. FEBUS: Thank you.

19 A Yes. I am paid my usual fee, which is \$200 an hour.

20 Q So how many hours have you worked in preparation for  
21 this case?

22 A Something on the order of probably 135.

23 Q 135 hours to prepare for the case?

24 A Yes.

25 Q Okay.

1 A I read through --

2 Q And are you -- I'm sorry.

3 A No, I was just saying you don't read 3,000 pages of,  
4 manuscript --

5 Q I understand.

6 A -- in rapid periods of time.

7 Q Understandable. But you've spent 135 hours preparing  
8 for the case at \$200 an hour. Is that correct?

9 A Yes.

10 Q Are you being paid for the time you spend testifying?

11 A Yes.

12 Q Is that the same rate?

13 A Uh, as I remember, it is \$300 an hour, which is the  
14 standard rate for expert testimony, as I understand it.

15 Q How about the time that you spent yesterday in the  
16 courtroom listening to other testimony, were you paid for  
17 that time?

18 A To be frank, I am not a very good businessman, so I  
19 am not sure.

20 Q But you may have been paid for that time, you are not  
21 sure?

22 A I may, I don't know.

23 Q Have you testified in trials before?

24 A No.

25 Q Have you -- so you haven't testified in obscenity

1 trial?

2 A No.

3 Q In this case, would it be normal in your profession  
4 as an academic to testify in trials and then to add that  
5 to your resume?

6 A I can't really see -- No, I mean I -- No. It has no  
7 value to me as a professor of literature.

8 Q So your testimony in this trial, which is largely  
9 about obscenity, has no value to you academically, I mean  
10 it is not something you would put on a resume or note  
11 somewhere?

12 A No, I can't -- No. The kinds of jobs that I would  
13 apply for as a professor don't usually focus on whether or  
14 not I have expertise in criminal prosecutions.

15 Q But in your resume you've put down other things, when  
16 you've taught, when you've given trainings, when you've  
17 written books, when you've done any -- Are you here in a  
18 professional capacity as an expert?

19 A Yes.

20 Q Okay. On your resume you list other professional  
21 capacities. Your resume is very extensive. All the other  
22 professional capacities in which you've acted over the  
23 course of the past 20 years or so, and this is something  
24 you would not put on your resume, is so dissimilar from  
25 that.

1 A That would be my first inclination. I can't -- I  
2 mean --

3 Q Okay. You mentioned a moment ago references to  
4 Barnes and Noble, and that the defendant's work doesn't  
5 have to compare to Shakespeare in order to be considered  
6 serious. Is that correct?

7 A Yes.

8 Q When you were making that reference, I took your  
9 point to be that there are other books in Barnes and Noble  
10 that don't stand up to Shakespeare, but Barnes and Noble  
11 doesn't, you know, kick those out or not publish them or  
12 not carry them?

13 A Uh-huh (Affirmative Response).

14 Q To the best of your knowledge, are any of the  
15 defendant's stories in Barnes and Noble?

16 A No, to the best of my knowledge.

17 Q After reviewing the defendant's stories, you also  
18 just testified that -- I'm sorry -- you testified that  
19 after reviewing the defendant's stories, you concluded  
20 from a serious perspective of those who study literature  
21 that his stories have serious literary value. Is that  
22 correct?

23 A The more accurate rendering of that would be that  
24 from the standards of people who study literature, his  
25 stories would manifest serious literary value, yes.

1 Q So you refer to people who study literature?

2 A Yes.

3 Q Are you aware that the Court, sitting as a fact  
4 finder, has to look to whether a reasonable person would  
5 consider his stories -- to have serious literary value and  
6 not what a group of professors would consider to be  
7 literary value?

8 MR. FAKHIMI: Judge, I object. I don't think  
9 the witness would be able to even answer that.

10 THE COURT: What do you mean? What do you mean  
11 would not be able to answer that?

12 MR. FAKHIMI: The government attorney is asking  
13 the witness whether or not something is the province of  
14 the Court for the witness.

15 THE COURT: Well, I think he's testifying as an  
16 expert, so I think that's appropriate cross examination as  
17 to the witness' ability to -- or expertise in the area of  
18 which he's been called to testify as an expert.

19 MR. FAKHIMI: But that wasn't the question, Your  
20 Honor. She was asking the witness whether or not  
21 something was the province of the Court as a fact finder.  
22 The witness here testified as an expert on literary value,  
23 but does not necessarily where the province of the  
24 Court begins and ends, where the province of a jury begins  
25 and ends. I believe counsel is editorializing.

1                   THE COURT: Well, I think if your objection is  
2 that the question is outside his area of expertise --

3                   MR. FAKHIMI: And outside the scope of his  
4 direct testimony and it does not go to bias or anything.  
5 I can't -- I can't understand how he would be able to  
6 answer the question. It calls for a legal conclusion.

7                   THE COURT: Well, the question asked -- I don't  
8 think the question would be improper to the appropriate  
9 expert because, generally speaking, experts are testifying  
10 about standards and whether things meet -- you know, like  
11 in a doctor's case whether something meets the medical  
12 standard.

13                  But the question here, I think, is whether he's  
14 testified in that capacity on that sort of issue. So in  
15 that degree, I will sustain your objection, but the  
16 general statement that an expert can't comment on the law  
17 I think is incorrect. But I don't think this witness has  
18 testified about that, and as I understand it, has not been  
19 presented to the Court as an expert in that regard. I  
20 think he's presented simply as an expert on what is  
21 literature -- literary value.

22                  In that sense, I think your objection is correct --  
23 is valid, and I sustain it for that purpose.

24                  MR. FAKHIMI: Thank you.

25                  BY MS. FEBUS, CONTINUED:

1 Q I'll just reask the question based on the testimony  
2 that you gave. Did you testify several minutes ago that  
3 from the perspective of people who study literature, the  
4 defendant's stories would not be considered obscene or  
5 that they would be considered to have literary value?

6 A Again, we are working with my somewhat limited  
7 understanding of the legal implications of the word  
8 obscenity.

9 Q I'm just asking you about what you testified to not  
10 five minutes ago.

11 A What I testified to was that people who study  
12 literature would find his stories to have serious literary  
13 value.

14 Q Okay. You also testified about a story called  
15 "~~\*\*\*\*\*~~", which is in evidence. I believe that you  
16 testified that you thought that that story had literary  
17 value because it was predicated upon an inversion of  
18 biological reality, of coming into being through sexual  
19 acts. Is that correct?

20 A To as far as you have gone, yes.

21 Q And then you further made a statement or concluded  
22 that the story -- that through the story, Suzy and her  
23 father -- and again I'm quoting you -- were saved through  
24 the acts that they engaged in?

25 A Yes, they were biologically saved. Yes.

1 Q They were biologically saved. Okay. I want to make  
2 sure that we are all talking about the same story. So  
3 "\*\*\*\*\*" involves a father raping a girl with a large  
4 engorged penis to the point where his penis goes through  
5 her diaphragm, through her lungs, rips her apart. He then  
6 ejaculates into what is left of her lungs and strangles  
7 hers. Okay. How does this evidence a saving of Suzy and  
8 her father through that text?

9 A Because the seizure of Suzie and the sexual encounter  
10 is the mechanism through which the nanobots are entered  
11 into her body and preserve her against a plague that would  
12 otherwise kill her. The narrator in the story, the  
13 father, talks about the fact that his younger sister has  
14 run away, and the period in which this act should have  
15 been held with her or done with her, and that the result  
16 is that she has died, in agony, without any -- he comments  
17 that there are no pain killers that will salvage someone  
18 who is attacked by this plague.

19 It's obviously science fiction. And the father is  
20 obviously distraught in the course of this story that he  
21 has had such a devastating effect upon his daughter.

22 In fact, Mr. McCoy's story is predicated on the fact  
23 that the father, in order to do this act, has -- actually  
24 takes a pill which drives him into some sort of total  
25 amoral sexual frenzy that precipitates the very violence

1 that you are talking about. And when he -- when the  
2 effect of this pill wears off, he is incredibly distraught  
3 at the potential that his daughter has actually died.

4 Q The fact that he's remorseful somehow gives it  
5 literary value. Is that your testimony?

6 A The fact that he is remorseful indicates a  
7 complicated psychology within his character that gives it  
8 literary value.

9 Q Did you also just testify -- and again I'm using the  
10 language you just testified to -- that there are cases  
11 where work may be so disturbing that it does distract from  
12 its literary value?

13 A Yes, potentially. It may distract from an initial  
14 understanding of its literary value, which was obviously  
15 the case in the works of the Marquis de Sade.

16 Q We are speaking about the defendant's stories, was  
17 that your testimony?

18 A No, that was my general testimony.

19 Q That was your general testimony?

20 A The general testimony as to a historical pattern in  
21 which literature that addresses sexual issues is often  
22 found disturbing by contemporary audiences.

23 Q It was your testimony that disturbing -- whether a  
24 story is disturbing, the extent to which it is disturbing  
25 can detract from its literary value. Was that your

1 testimony earlier?

2 A No. My testimony is that can detract from its  
3 reception and the understanding of the value, which in  
4 historical context can be better perceived.

5 Q So you are speaking about its distraction relative to  
6 the audience who receives it?

7 A Its initial audience, yes.

8 Q And an audience in that case would be a reasonable  
9 person or an average person in this community?

10 MR. FAKHIMI: I object, Your Honor. Professor  
11 Richardson's testimony was only in support of the third  
12 prong of the literary test, which is whether or not there  
13 is or not serious literary value to the work. Community  
14 standards, Your Honor, do not come into play with respect  
15 to the analysis of that prong.

16 In other words, Your Honor, literary value is  
17 literary value throughout the country. It does not differ  
18 from community to community. The other two prongs will  
19 vary from community to community.

20 MS. FEBUS: I have -- I'm sorry. I have two  
21 responses. First, any fact that the expert, Mr.  
22 Richardson, puts into evidence is something that the  
23 government can cross him on. He made a factual statement  
24 about standards that I can reference to community  
25 standards for prongs one and two.

1           I agree that community standards are not a prong of  
2 three; but three, the third prong, rests on the perception  
3 of the average person. And I did ask the defendant that  
4 question also.

5           THE COURT: I think he's answered about his view  
6 about those who studied literature. He's not previously  
7 testified about the reasonable man's or average person's  
8 standard.

9           MS. FEBUS: But he has testified extensively  
10 about obscenity standards.

11           MR. FAKHIMI: I would disagree with that, Your  
12 Honor.

13           MS. FEBUS: Well, he's testified extensively  
14 about obscenity from the 1800s, what he thinks the  
15 evolving view of sexuality is, what he thinks social mores  
16 are, going to a hundred years from now. He's testified to  
17 these facts through direct testimony, and the government  
18 should be able to pursue a line of questioning based on  
19 what he's testified to.

20           THE COURT: Well, the Court sits in fact  
21 finding. I certainly have not considered -- evaluate the  
22 evidence yet, but I don't recall him testifying at all  
23 about obscenity as such, that was classified, you know.  
24 So what you all are going to argue about what that means,  
25 I don't know.

1           But as I understood it, his testimony is as a  
2 literary expert, and you are about to ask him about what  
3 -- how this is perceived by the average person or the  
4 common person. Is that -- am I right?

5           MS. FEBUS: Yes. Only because he is the one who  
6 said that his -- his statement about how disturbing  
7 elements of a work affect its literary value depends on  
8 how it is perceived by an audience. He just said that,  
9 how it is perceived by the recipients. And I'm asking him  
10 who the recipients of this work would be.

11           THE COURT: All right. If that's what you are  
12 asking, the objection is overruled.

13           MS. FEBUS: Thank you.

14 BY MS. FEBUS, CONTINUED:

15 Q        Okay. So back to that line of questioning. I think  
16 that we just established, but correct me if I'm wrong,  
17 that your view about the literary value of this material  
18 relative to whether or not it is disturbing, in part,  
19 hinges -- I'm sorry -- in part relies upon or is relevant  
20 to who receives his stories, who the audience is. Is that  
21 correct? Did you just testify to that?

22 A        Yes.

23 Q        Okay. Thank you. Going to the 18 stories that you  
24 testified about, you are discussing the relative literary  
25 value of those. Is that correct?

1 A Yes.

2 Q And during your testimony, through you and defense  
3 counsel, there were references made to whether those 18  
4 stories were drawn from the larger, what you are calling a  
5 body of work. Is that correct?

6 A Correct.

7 Q And you said that you reviewed all of the -- you said  
8 that you reviewed, in response to defense counsel's  
9 questions, approximately 240 stories?

10 A Yes.

11 Q There are approximately 276 stories. Are you aware  
12 of that?

13 A I reviewed what I was given.

14 Q Are you aware that the 18 stories that have been  
15 specifically referenced -- I'm sorry. And you were in the  
16 courtroom I think during the part of the examination where  
17 all those stories came into evidence. Even if you  
18 weren't, since you read all the stories, are you aware  
19 that the 18 stories that have been focused upon during  
20 this trial come from the defendant's writings which  
21 started in about 1989/1990, and which he posted on the  
22 Internet through 2007. Are you aware that those 18  
23 stories were taken from that time frame?

24 A Yes.

25 Q Okay. So, if you are saying that you are considering

1 the defendant's stories as a body of work, isn't it fair  
2 to say that the 18 stories that have been focused on by  
3 the government and by the defense are representative of  
4 that body of work that he wrote over that time span?

5 A Only in regard to the time span. That wasn't really  
6 what I was asked to address. I was asked to address the  
7 literary quality of the work.

8 Q Is it your testimony that the shorter a story is, the  
9 less literary value it has?

10 A The more difficult it is to, in isolation, discover  
11 literary value.

12 Q I am not talking an isolate -- I am talking about a  
13 specific work. You read all the stories. You just talked  
14 -- we talked about "\*\*\*\*\*". You talked about that one  
15 story and you referenced another. So I'm asking you your  
16 expert opinion. Is it your expert opinion that the  
17 shorter a story is the less literary value it has?

18 A The more difficult it is to ascertain literary value  
19 in isolation. The interesting thing about "\*\*\*\*\*" is  
20 that it is not one of the shorter stories that the  
21 prosecution has selected.

22 Q Exactly. "\*\*\*\*\*" is one of the longer stories.  
23 Is that the case?

24 A Right.

25 Q Is it your testimony that the longer a story is the

1 more literary value that it has?

2 A No. Not necessarily.

3 Q You also -- I'm sorry.

4 A Not necessarily.

5 Q You also spoke about the use of parody and spoof in  
6 the defendant's stories?

7 A Yes.

8 Q Is it your testimony that simply using such a device  
9 makes it serious?

10 A It evidences a literary ability. The ability to  
11 manipulate literary technique.

12 Q And you also testified -- again, your testimony ten  
13 minutes ago -- that the parodies that you saw in the  
14 defendant's stories occur, quote, infrequently and are not  
15 necessarily pervasive?

16 A That's true, but I had not quantified that  
17 information. My memory may be mistaken in that regard.

18 Q Your memory may be mistaken in that regard?

19 A Relative to the number of parodies in the 240 stories  
20 that I read.

21 Q Do you deny making that statement, though?

22 A No.

23 Q You also spoke about various narrative strategies,  
24 spoke about points of view, and you characterize the  
25 defendant's stories -- as again I'm quoting -- sexual

1       escapades. Is that correct?

2       A      Yes.

3       Q      In the stories that you are referring to as sexual  
4       escapades are ones that involve the rape and strangulation  
5       by ejaculation of very young children, as young as four.

6       Is that correct? Are those the stories that you are  
7       referring to as mere sexual escapades?

8       A      No.

9       Q      So that story you wouldn't refer to as a mere sexual  
10       escapade?

11      A      No. Huh-uh (negative response).

12      Q      Do you recall which stories utilized folk tales?

13      A      Not offhand. I'm sorry. They are fairly easy to  
14       find, and I guess I could discover that if you wanted.

15      Q      You also spoke about three themes or -- I'm sorry --  
16       I think maybe it was four themes, the nature of love?

17      A      Yes.

18      Q      The difference between love and sexuality in society?

19      A      Yes.

20      Q      And how societies -- how society helps us construct  
21       our view -- I guess our view of sexuality and how we  
22       relate to one another?

23      A      Yes.

24      Q      And that's how you qualify the stories?

25      A      Those are three of the themes that I mentioned, yes.

1 Q And you also called the stories romance stories. Is  
2 that correct, your testimony yesterday?

3 A Yes, in terms of the basic structures.

4 Q And then you also, a couple minutes ago, testified to  
5 what you considered to be political themes in the  
6 defendant's stories?

7 A Yes.

8 Q Yesterday you testified on direct that the  
9 defendant's stories are or may be considered taboo. That  
10 was the language that you use. Is that correct?

11 A I don't remember using that language.

12 Q We can check the record, but you used the term taboo  
13 to describe some of the defendant's stories.

14 A Oh, I am I'm sorry. I do remember the context in  
15 which you -- which I did it.

16 What I was talking about was that he had used the  
17 last or one of the last sexual taboos in our culture in  
18 order to make the stories, in some senses, as shocking as  
19 they might be in order to get us to get the audience to  
20 think about the themes involved.

21 Q When you say audience, who are you referring to?

22 A His readers.

23 Q Is it correct -- is my now characterization correct  
24 that you referred to the stories -- defendant's stories as  
25 taboo, and I think this was maybe similar to what you just

1 said, because they do involve the rape and incest of --  
2 you know, between fathers and mothers and very young  
3 children? Is that --

4 A Yes.

5 Q -- the nature of the defendant's stories?

6 A I mean -- Yes.

7 Q Okay.

8 MS. FEBUS: May I have one second?

9 THE COURT: You may.

10 Q Can you, as a literature professor, someone who  
11 studied the English Language, can you give me your  
12 qualified definition of the word taboo?

13 A A taboo is a social construct that violates essential  
14 morality within a particular culture.

15 Q Okay. And again, you reviewed all the defendant's  
16 stories. Is that correct?

17 A Yes.

18 Q And you testified -- I would need to talk about this  
19 a little more. Your qualification or your view of the  
20 defendant's stories, rather, are mainly -- you called them  
21 yesterday, and I'm quoting again, basic romance plots?

22 A Right.

23 Q I want to refer you to Government Exhibit 5-D, which  
24 should be in the book that you have in front of you. 5-D  
25 is a story called \*\*\*\* \* \*\*\* \* \*\*\*\*, and it's been

1 entered into evidence.

2 A Yes.

3 Q Do you recall reviewing this story in preparation for  
4 trial?

5 A Yes.

6 Q Do you recall our discussion a few minutes ago about  
7 how you viewed the relative length or shortness or brevity  
8 of a story in relation to its literary value?

9 A Yes.

10 Q I would like to ask you to read -- and this is --  
11 this is -- I'm sorry -- this is one -- and we also spoke  
12 about "\*\*\*\*\*", which is one of the longer stories of  
13 the defendant's. Okay. So this is one of the shorter  
14 defendant's stories, right?

15 A Yes.

16 Q Okay. I would like to ask you, have you, with the  
17 Court's indulgence, read this relatively short story.  
18 It's two pages and then there are two sentences on the  
19 third page.

1 \*\*\*\*\* \* \* \* \* \* \*\*\*\*\* \* \* \* \* \* \*\*\*\*\*  
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16          Q       Is this one of the stories --  
17                   THE COURT: I'm sorry. I need to stop you right  
18                   here. There's a matter the Court needs to address so  
19                   we'll take a recess for about 15 minutes.  
20                   (Recess)  
21                   THE COURT: All right. Thank you. We can now  
22                   continue. I don't think there will be any more  
23                   interruptions.  
24                   MS. FEBUS: Thank you, Your Honor.  
25          BY MS. FEBUS, CONTINUED:

1 Q Mr. Richardson, we had just ended and you had just  
2 read into the record for the Court Exhibit 5-D, which was  
3 a story titled "Can I come in her." Is that correct?

4 A Yes.

5 Q And before I asked you to read that story into the  
6 record, we were discussing your characterizations of the  
7 defendant's stories as romance plots?

8 A Right.

9 Q Is that a story that in your professional opinion you  
10 would qualify as a romance plot?

11 A Probably not. This one would arrive at a -- A  
12 romance plot usually looks at some sort of courtship in  
13 which an affiliation is not necessarily already been made.

14 Q Is this one of the stories that you referred to then  
15 as having political value?

16 A Uh, in the sense that this is a story that in  
17 totality brings up the issue, yes.

18 Q You testified yesterday about a literary device  
19 called close reading. Is that correct?

20 A Yes.

21 Q In the expert summary and you testified yesterday  
22 about the definition of close reading. You explained to  
23 us what it was, and I want to make sure that I capture  
24 that. Close reading involves a careful and sustained  
25 interpretation of a passage or passages of a text placing

1 great emphasis on the particular over the general. Is  
2 that correct?

3 A Yes.

4 Q That technique is different though from reading  
5 stories as a whole. Is that correct?

6 A It is a technique of reading stories that can be  
7 deployed in the totality of a work. A whole work could be  
8 read closely.

9 Q But the definition for close reading involves placing  
10 great emphasis of the particular over the general?

11 A My use of the word particular in that circumstance  
12 referred to looking at the way in which literary language  
13 is deployed as opposed to the way language is deployed  
14 generally.

15 Q Okay. Again, I just want to focus on the definition  
16 that you gave and that is in your expert witness notice,  
17 which is that close reading is a sustained interpretation  
18 of passages of text, placing great emphasis of the  
19 particular over the general. Is that the definition of  
20 close reading?

21 A I can live with that definition.

22 Q Yesterday you also testified about works that have  
23 been deemed obscene in the past or have been criticized  
24 for having obscene content. Is that correct?

25 A Yes.

1 Q You testified about evolving social mores and taboos  
2 and sexuality. Is that also correct?

3 A Yes.

4 Q You testified by those matters in the context of  
5 rendering your expert opinion about literary value whether  
6 it is serious. Is that correct?

7 A Yes.

8 Q Are you aware that stories strikingly similar to the  
9 defendant's have been recently held to be obscene?

10 A No.

11 Q You testified yesterday going through -- and I  
12 believe this was in the context of going through your  
13 qualifications as an expert, but also a little bit in your  
14 substantive testimony about peer review.

15 A Yes.

16 Q And you testified that you have written works that  
17 had been peer reviewed?

18 A Yes.

19 Q And when you use the term peer review -- and again, I  
20 want to understand the manner in which you are using it  
21 and the manner in which your literary community of  
22 professors would use it. I understand that to mean a  
23 process by which something is proposed as a research  
24 product or a publication and is evaluated by a group of  
25 experts. Is that a fair definition?

1 A Yes.

2 Q To the best of your knowledge, have any of the  
3 defendant's stories been peer reviewed?

4 A I have no knowledge.

5 Q Do you -- and also speaking about what you -- you  
6 qualified yourself as an expert yesterday. Is it correct  
7 that you currently teach?

8 A Yes.

9 Q Would you teach any of the defendant's stories as an  
10 exemplar of the use of literary devices in any of your  
11 classes?

12 A No.

13 Q You testified yesterday that the defendant may have  
14 -- and I think you are talking about the political arm of  
15 whether a piece of work is serious. You testified that  
16 the defendant may have used these stories to communicate a  
17 certain message to his audience. Is that correct?

18 A Yes.

19 Q And perhaps a certain political message you testified  
20 to that yesterday and a few --

21 A Yes.

22 Q -- minutes ago. Are you aware of some of the  
23 prologues and some of the other materials that have been  
24 brought into evidence? I think you are because you were  
25 in the courtroom. The defendant has stated when directing

1 and talking about his stories to his audience that he  
2 initially wrote his stories for his own enjoyment and that  
3 he then self-describes those stories as including  
4 scenarios -- and excuse my language -- "where if a little  
5 girl has sex or gets fucked, it is because she wants to  
6 get fucked and she asks for it." Are you aware that  
7 that's how the defendant has described some of his own  
8 works?

9 A Not exactly in those words, but, yes, I mean I am  
10 aware.

11 Q What is the political message in a story that  
12 describes that type of sexual activity?

13 A The political message attaches to the totality of the  
14 work, in that he's raising issues about sexuality.

15 Q I'm sorry. I'm sorry. I need to reask that. Is the  
16 way that he -- excuse me for doing that -- is the way that  
17 he describes his stories, is that in the form of a  
18 political message?

19 A It is not -- does not overtly use political language,  
20 but I cannot at this moment run through an exhaustive  
21 potential use of all the ways political points might be  
22 made. It is indeed possible that he is doing this in  
23 terms of raising the issue.

24 In other words, in this story, for example, the one  
25 that you asked me to read into the record, we have a

1 teenage girl, her father and mother. We do not have any  
2 idea how old this teenage girl is. We do not have any  
3 idea whether or not she is old enough under the particular  
4 jurisdiction, if we were to predicate this as being an  
5 incident happening within effective United States.

6 Q Do you recall in that story her being described as  
7 being very young?

8 A No, I don't. She's described as a teenager. This  
9 could be 13, this could be 19.

10 Q And in your opinion, is the age of a child relevant  
11 to the literary value of a text or a story? Is that what  
12 you were getting at?

13 A No, that's not what I am getting at. What I am  
14 getting at is in this particular story we have a young  
15 woman who might well have surpassed the age of consent as  
16 defined in the jurisdiction in which she exists.

17 Q Are you testifying to a matter of law right now?

18 A No, I'm describing a possibility.

19 Q Did you refer to the age of consent and the  
20 jurisdiction?

21 A Yes.

22 Q Is that -- I mean that's a legal term, that's a legal  
23 reference?

24 A Right.

25 Q Are you qualified to testify to legal matters?

1 A To the extent that I know them.

2 Q Are you qualified here as a legal expert in obscenity  
3 law?

4 A Yes.

5 Q You are --

6 A No, not in obscenity law. No. Excuse me. I'm  
7 sorry.

8 Q You also testified to your thoughts about how society  
9 views sexuality. Is that correct?

10 A Uhm, I raised the issue of the fact that society does  
11 have attitudes about sex, yes, and sexuality.

12 Q You testified yesterday that some of the defendant's  
13 stories may have been written for sexual gratification?

14 A I don't remember testifying to that.

15 Q Yesterday you testified that -- or you described,  
16 rather, in your testimony that the defendant's stories may  
17 be merely a pure -- and again, quoting from you --  
18 fictional musings. Is that correct?

19 A Yes, in the sense that they are fiction.

20 Q Did you use the term fictional musings?

21 A Yes. Well -- no, I don't remember that phrase, but I  
22 won't object to it.

23 Q In that opinion, where you did use the phrase  
24 fictional musings, was that -- that was relevant to your  
25 determination or your opinion about the literary value of

1 the stories, correct? The part of your general testimony  
2 you used the term fictional musings?

3 A Yes, this is not a work of fact. It is not even a  
4 work of creative nonfiction.

5 Q It is not a work of fact and it is not a work of  
6 creative nonfiction?

7 A Correct.

8 Q What you've just said informs -- again, I want to  
9 make clear -- informs your view of whether this is work  
10 that has serious literary value?

11 A It --

12 Q That it is not fact?

13 A Yes, it informs my view that literature as distinct  
14 from other varieties of writing.

15 Q I'm asking you specifically about the defendant's  
16 stories which is what you are here to testify about.

17 A I am here to qualify these stories within a broader  
18 compass of what literature is. In order do that, I must  
19 rely upon my expert sensibility as to what that  
20 constitutes. That constitutes something that is not based  
21 in fact.

22 Q So my simple question is, you used the term fictional  
23 musing to discuss the literary value of the defendant's  
24 stories generally and the defendant's stories in  
25 particular, and part of fictional musings is that they are

1 not based in fact?

2 A Correct.

3 Q And that you just said forms your opinion about the  
4 literary merit of these stories?

5 A The fact they are not factual, yes.

6 Q Hypothetically, if some of these stories were based  
7 on actual incidents of child abuse, sexual abuse, rape,  
8 molestation, would that change your view given what you  
9 just testified to?

10 A It would recategorize what I am looking at.

11 Q Okay.

12 A Truman Capote's "In Cold Blood" is a fictional  
13 rendering of a demonstrable murder. It is entitled  
14 creative nonfiction.

15 Q Okay. Can you give the Court an example of a text  
16 that you would find obscene?

17 MR. FAKHIMI: Object, Your Honor. Again, the  
18 witness is here not to testify as to either of the two  
19 prongs of the Miller obscenity determination with the  
20 exception of literary value, the third prong.

21 Government counsel is calling on the witness to  
22 speculate as to a work that would satisfy the first two  
23 prongs, which is neither within the scope of his testimony  
24 nor within the area of his expertise.

25 MS. FEBUS: The witness is testifying he's an

1 expert who has studied in all manners of literature, both  
2 American, Irish, and French as he testified yesterday. I  
3 will happily rephrase the question.

4 BY MS. FEBUS, CONTINUED:

5 Q And I will simply ask, can you give the Court an  
6 example of a text that is short and a text that is longer  
7 per your earlier testimony where you found that it doesn't  
8 have literary value?

9 A My difficulty is that I don't read this kind of  
10 material as recreational literature, and it does not fall  
11 within the purview of my normal teaching, and therefore,  
12 I'm sure if we wanted go to an adult bookstore I could  
13 find something, but --

14 Q But in your expert opinion testimony as you are  
15 giving it to this Court today, your answer is that you  
16 cannot? And you have also just now stated that you are  
17 not familiar with this type of what you are calling  
18 literature. Is that what you just stated?

19 A To the extent that there is literature that has been  
20 considered obscene in the past, I have read that  
21 literature. Usually in the context of --

22 Q I'm asking you if you can give an example of a  
23 writing, a text similar in length and kind to what you  
24 have been testifying about for the past two days, where  
25 you have found that it does not have literary value or

1 serious literary value?

2 A There are passages in the Marquis de Sade's work that  
3 I find obscene.

4 Q I am not asking you about obscenity. Defense counsel  
5 just popped up and said you couldn't testify about that.  
6 I'm simply asking you if you have come across a text that  
7 you have found not to have literary value. Are you saying  
8 that you have come across text passages in the Marquis de  
9 Sade that do not have literary value?

10 A To my mind --

11 Q That's the question I'm asking you.

12 A To my mind, they do not.

13 Q So you have come across text in that context that  
14 does not have literary value, but all of the 276 stories  
15 of the defendant that you read, all those have literary  
16 value, where all those taken as a whole have literary  
17 value?

18 A Taken as a whole, yes.

19 MS. FEBUS: No further questions.

20 THE COURT: All right. Is there any redirect?

21 MR. FAKHIMI: Yes, please.

22 THE COURT: All right.

23 REDIRECT EXAMINATION

24 BY MR. FAKHIMI:

25 Q Professor, do you book speaking engagements?

1 A Yes.

2 Q You get paid for your work when doing those?

3 A Yes.

4 Q Does that include the preparation time and the  
5 research necessary for the speaking engagement as well as  
6 the engagement itself?

7 MS. FEBUS: Objection.

8 THE COURT: Just one minute.

9 MS. FEBUS: Objection as to relevance.

10 MR. FAKHIMI: You were asking our expert if he  
11 got paid.

12 THE COURT: Let me just tell both of you all  
13 something. I am not a jury. I am a judge. I know that  
14 witnesses get paid.

15 MR. FAKHIMI: Right.

16 THE COURT: You know.

17 MR. FAKHIMI: Very good, Your Honor.

18 THE COURT: Not witness but witnesses called as  
19 experts. So to the degree that that has any factor that  
20 the Court takes into consideration that appears to affect  
21 the witness' credibility the Court will take that into  
22 account. So unless there's something else you think you  
23 need to point out to me specifically, the Court is well  
24 aware and would expect this witness to be paid for his  
25 appearances as well as his testimony as an expert.

1 MR. FAKHIMI: Very good, Your Honor. Thank you.

2 THE COURT: All right.

3 BY MR. FAKHIMI, CONTINUED:

4 Q Professor, does your expert opinion of the relative  
5 literary value of either an individual work or a body of a  
6 work as a whole in any way depend on someone else's  
7 assessment of literary value in that work?

8 A Only to the extent that I might share certain  
9 expectations about the nature of literature. To the  
10 extent that given those set of expectations we would reach  
11 a similar conclusion, the answer would be perhaps.

12 But I don't necessarily rely on other people to tell  
13 me what I should think about these works any more than I  
14 would on a play by Shakespeare.

15 Q Therefore in your capacity as a literary analyst, you  
16 are able to analyze for literary value a single story or  
17 body of work and you will reach your con -- and you can  
18 reach a conclusion that would stand independent of other  
19 people's conclusions, as to the same analysis?

20 A Absolutely.

21 Q Very good. I would like to ask you if you could,  
22 please briefly relate for the Court the premise and the  
23 story of "\*\*\*\*\*". How does it start, what happens, and  
24 how does it end?

25 A The story is predicated in either an alternative

1 universe, which from a human perspective would be seen as  
2 postapocalyptic. Some plague has overtaken a population.  
3 The characters in the story are presented as humanoid.  
4 The plague apparently attacks people, and unless they  
5 receive some sort of treatment, they die a horrible  
6 painful death.

7 The precipitating cause of this plague is or was a  
8 scientist with a sort of strictly religious fanatical kind  
9 of attitude who has melded technology to a religious  
10 perspective. And in order for males and females to  
11 survive, they must engage in intercourse, and they must  
12 engage in intercourse at or about the time that, at least  
13 in terms of the females, that the females begin to have  
14 menstrual cycles. And evidence appears that the youngest  
15 daughter of the central male character has entered that  
16 period of her life, and therefore, it is necessary for him  
17 to have sex with her.

18 There is a -- the natural reluctance -- the implied  
19 natural reluctance of the father to have intercourse,  
20 especially with a child as young as the girl in question,  
21 has been widely recognized within the society, and  
22 therefore to overcome that, a mechanism has been devised  
23 which essentially removes the qualms of conscience and  
24 allows the kind of violent sexual violation that's  
25 necessary.

1           The story entails a young woman being violated in  
2 this way. And in the process of insemination, certain  
3 kinds of nanobot technology is introduced that essentially  
4 repairs all of the damage that has been done to her. The  
5 father takes the pill, commits these acts, essentially  
6 comes out of the drug induced haze, is incredibly  
7 remorseful at what he has done, and the technology repairs  
8 his daughter, and there's a kind of happy ending that she  
9 has been saved from this horrible death that haunts her  
10 father, as I mentioned before, because of his own sister's  
11 death.

12 Q       So the story has a happy ending?

13 A       Yes.

14 Q       If we can talk briefly about the story that  
15 government counsel asked you to read into the record. It  
16 was only two pages long, a sentence or two on the third  
17 page. From whose point of view is that story narrated,  
18 Professor?

19 A       It is narrated from the point of view of the teenage  
20 girl.

21 Q       Thematically, what does that short story deal with?

22 A       Well, thematically it deals with, certainly,  
23 sexuality. Ironically, the young girl obviously wishes to  
24 please her father by providing him a kind of sexual  
25 pleasure. It is a -- it is the rendering of a world in

1 which none of the characters in this episode seem to have  
2 any moral objections to incestuous relationships, unlike  
3 most of society would; and therefore, raises the issue of  
4 whether or not our views on sexuality are in some  
5 instances prescribed by external as opposed to internal  
6 conceptions.

7 In other words, is there any inbred or inherit  
8 objection to incestuous sexual relations between people or  
9 has society deemed those immoral and certainly illegal for  
10 its own purposes and for its own reasons? So it raises  
11 these issues and asks implicitly the reader to think about  
12 those issues and whether or not we wish to reconceive  
13 this.

14 The point that I was trying to make on cross was as  
15 we don't know how old this girl is as opposed to other  
16 stories in which the age of the young girls are -- is made  
17 explicit, the question we have here is, you know, this is  
18 supposedly a teenager and that raises the issue of how  
19 knowledgeable can she be, how mature is she to make the  
20 kind of decision that she makes on her own.

21 Q Interesting. Professor, government counsel, on cross  
22 examination, briefly discussed with you the analytical  
23 technique of close reading, and focused in on the words  
24 that it is a careful scrutinization of a passage or  
25 passages from a work or of a work. When analyzing these

1 stories using this analytical technique, did you apply the  
2 technique to the entire works or to just some passages?

3 A I applied the technique to the entire work. If one  
4 were to actually render such a reading, the result would  
5 be so voluminous that it would be impossible to ever move  
6 beyond for in terms of conversation sake. So when I refer  
7 to passages, usually passages are presented as  
8 illustrative of larger patterns that are seen in the work  
9 as a whole.

10 Q Lastly, Professor, government counsel asked you if  
11 you would be willing to teach this material in your  
12 literary classes to your students, you said you were not.  
13 Are there other pieces of serious literature that you  
14 would not be willing to teach in your classes?

15 A Yes. It was more -- My response was predicated on of  
16 all the literature that I have at my disposal to teach,  
17 what am I going to select, and these would not be at the  
18 top of my list. But then again, Francis Trollop's novels  
19 would not be at the top of my list either, and they are  
20 certainly as prim, proper, and seriously literary as you  
21 could possibly wish for.

22 Q Thank you, Professor.

23 MR. FAKHIMI. I have no further questions,  
24 Judge.

25 THE COURT: All right. Let me ask this

1 question, and I'll give both of you an opportunity to ask  
2 later. I should have asked these after the government's  
3 cross.

4 Professor, you have referred to the defendant's work,  
5 now the Court has been told about 240-something stories,  
6 18 that have been put into evidence here, and what I think  
7 of, of course, you think of a work by Shakespeare, you  
8 know, Julius Caesar being a work, and then you think of  
9 Shakespeare's entire work. Explain to me how do you --  
10 how is it that you view these as not individual works and  
11 -- In other words, are there two ways to look at it, are  
12 they to be looked at as individual works and then to be  
13 looked at as an entire work? And if so, why is that and  
14 what is the significance of it?

15 THE WITNESS: Well, Your Honor, if we were to  
16 make assessments of any writer's work based upon a single  
17 instance of that writer's works, we might well come to  
18 different conclusions about the relative quality of that  
19 writer's efforts.

20 For instance, I teach Shakespeare. I almost never  
21 teach the three Henry the Sixth plays because Shakespeare  
22 wrote better plays. And if I were to assess Shakespeare's  
23 work solely on the basis of one of those plays, I might  
24 consider him a quite mediocre playwright. He got better  
25 as a writer. And therefore, if I'm going to evaluate the

1       totality -- or if I'm going to estimate Shakespeare's  
2       work, I need to read the whole thing and I have, and in  
3       some senses, I read everything that was here. I was asked  
4       to make an evaluation about the serious nature of all of  
5       these, and that's what I have attempted to present to the  
6       Court.

7                     THE COURT: All right. First of all, do you  
8       have any questions further based on the Court's questions?  
9       I'll give the government the same opportunity.

10                  MR. FAKHIMI: No, Your Honor, I do not.

11                  THE COURT: All right. Does the government have  
12       any questions of the witness based on the Court's  
13       questions?

14                  MS. FEBUS: Yes, one question.

15                                     RECROSS EXAMINATION

16                             **BY MS. FEBUS:**

17       Q       In your classes and as a general matter of teaching,  
18       we've all been to college, when you teach the general  
19       works of an author, do you often take a sampling of the  
20       works that span the spectrum of that author's scholarship?

21       A       Yes.

22       Q       Is that correct?

23       A       Yes.

24       Q       You can take a sample of what spans over the course  
25       of that person's entire writings to be representative of

1 their work as a whole as you have referenced it?

2 A Careful selection would allow for that, yes.

3 MS. FEBUS: Thank you.

4 THE COURT: All right. Any further, Mr.

5 Fakhimi?

6 MR. FAKHIMI: Yes, Your Honor, actually I do  
7 have one quick question.

8 **FURTHER REDIRECT EXAMINATION**

9 BY MR. FAKHIMI:

10 Q Professor, you have scrutinized these works as a  
11 whole, en masse, all of them, and then you see these 18  
12 that have been selected. You just mentioned a careful  
13 selection may allow for characterization of a subset as  
14 being congruent with the whole?

15 A Correct.

16 Q Is this such a careful selection, these 18 stories?

17 A In my opinion, it is not.

18 Q It is not?

19 A It is not.

20 MR. FAKHIMI: Thank you.

21 THE COURT: All right. Further recross? Is  
22 that it?

23 MS. FEBUS: No.

THE COURT: All right. Is there any objection  
to the witness -- I guess he's a stay at the court

1 witness. All right. So you may step down at this time.

2 THE WITNESS: Thank you, sir.

3 THE COURT: All right. You may call your next  
4 witness.

5 MR. FAKHIMI: Your Honor, at this time, the  
6 defense rests.

7 THE COURT: All right. Is there any rebuttal  
8 from the government?

9 MS. FEBUS: No, Your Honor.

10 THE COURT: Okay. All right. Let's see. We  
11 can do this a number of ways. Do you all want to be --  
12 wish to be heard in oral argument for any particular  
13 period of time or do you want to submit a written argument  
14 to the Court? Obviously the Court has to take some time  
15 to review the evidence as presented. The Court will not  
16 be rendering a decision immediately. So if you want to do  
17 a combination of those, I'll -- I'm open to a suggestion.

18 MS. FEBUS: Your Honor, I think it would be  
19 consistent with the bench memos that we tendered to the  
20 Court earlier to submit written responses if defense  
21 counsel would agree. If not, the government is prepared  
22 to proceed with an oral and perhaps an additional written  
23 response.

24 THE COURT: Okay. All right. Mr. Fakhimi?

25 MR. FAKHIMI: Your Honor, we have no objection

1 to filing argument in writing as opposed to handling it  
2 here today.

3 We would like to renew our Rule 29 for the record,  
4 and we do that here and incorporate the arguments therein  
5 by reference. If we may be allowed in these written  
6 pleadings that will be coming for briefings to further  
7 elaborate on those arguments as well, we would appreciate  
8 that.

9 THE COURT: Well, I don't want to mix the two  
10 things up. That's just a renewed motion for the reasons  
11 stated earlier.

12 MR. FAKHIMI: Very well.

13 THE COURT: All right. I mean, the Court's --  
14 First of all, the Court has withheld its ruling on the  
15 earlier motion and will handle that as stated. Also, the  
16 renewal of your motion, the Court takes the record as it  
17 appears.

18 MR. FAKHIMI: Just so that I make sure I'm of  
19 the same understanding as everyone else. The written  
20 briefs that will be forthcoming will be an attempt to  
21 revolve the difference between us and the government as it  
22 was manifested in the separate bench memos that were  
23 filed. Is that --

24 THE COURT: No. No. I mean, you can make your  
25 -- you can make a closing argument now to me --

1 MR. FAKHIMI: I see.

2 THE COURT: -- as to what you believe has not  
3 been proved or proved, whichever the case may be, or let  
4 it go at that, or if you want to just give the Court a  
5 written -- since the Court will be considering this some  
6 time you might want to put your closing argument in  
7 writing.

8 MR. FAKHIMI: I do. We would like to put our  
9 closing argument in writing, Judge, but I do have some  
10 legal argument I would like to present to the Court.

11 THE COURT: Yes. That's what I'm saying. I  
12 said it could be a combination of those, but obviously if  
13 you are going to make a written argument to me later, you  
14 can be more selective about what you want to talk to me  
15 about today or -- in terms of the time to give to it.

16 MR. FAKHIMI: I see.

17 THE COURT: How much time do you want today?

18 MR. FAKHIMI: Well, actually I may be able to  
19 submit those to you in writing along with the closing  
20 argument, Judge.

21 THE COURT: Let me let you all take a few  
22 minutes. Maybe it's unfair of me to ask you that. Well,  
23 I guess I got ahead of myself again.

24 **DEFENDANT'S ADVICE OF RIGHTS**

25 THE COURT: The defense rested, but I think -- I

1 advised Mr. McCoy yesterday of his right to testify or  
2 not. And what I'll ask to you today, Mr. McCoy, did you  
3 have sufficient opportunity to discuss that matter with  
4 your attorneys?

5 DEFENDANT MCCOY: Yes, I have.

6 THE COURT: All right. And of course, you were  
7 not called as a witness. Was it your decision not to  
8 testify in this case?

9 DEFENDANT MCCOY: Your Honor, I was, and quite  
10 happy to have my lawyers take the -- my case for me --  
11 because I'm definitely not the speaker. He did a good  
12 job.

13 THE COURT: Okay. So in other words, it was  
14 your choice not to testify?

15 DEFENDANT MCCOY: Yes, it was.

16 THE COURT: All right. By your response to me,  
17 I think I know the answer to this question also.

18 You don't believe you were unduly influenced or  
19 coerced in any way not to exercise that right?

20 DEFENDANT MCCOY: No, Your Honor.

21 THE COURT: All right. That is noted for the  
22 record.

23 Also we have a written document that we usually  
24 execute just so we have a written record where, with  
25 counsel, you sign off indicating that you decided not to

1 testify and that was your decision.

2 DEFENDANT MCCOY: I signed it.

3 THE COURT: All right. That was already signed?

4 DEFENDANT MCCOY: Yes.

5 THE COURT: All right.

6 MR. FAKHIMI: Wait --

7 THE COURT: I think he's probably talking about  
8 the plea. But there's a document she'll run for you with  
9 the caption of the case. If you will sign that and place  
10 it in the record.

11 Let's take a short recess --

12 Thank you, Mr. McCoy. You may sit down.

13 -- and let you all think about that, as to whether  
14 you want to do a combination. I don't have a problem with  
15 you doing some summary, but I don't think it needs to be  
16 an extensive argument today. I think while it's fresh in  
17 the Court's mind and yours, there maybe some comments you  
18 want to make and then make a more complete and full  
19 argument in writing. I'll let you all think about it.

20 (Recess)

21 THE COURT: All right. The Court has received  
22 the formal waiver of testimony, and I'll sign it. It will  
23 be -- This is your signature, is that right, Mr. McCoy?

24 DEFENDANT MCCOY: Yes, Your Honor.

25 THE COURT: All right. All right. Madam Clerk,

1 it may be filed for the record.

2 All right. Did you all, I guess, discuss among  
3 yourselves and between the parties as to what procedure  
4 you would like to follow for closing?

5 MS. FEBUS: Yes, Your Honor. I believe the  
6 parties have agreed that we would submit written closing  
7 arguments. The only thing that we would request, because  
8 we want to do so while everything is fresh, is that we  
9 have a date certain within the next two weeks to do that,  
10 a date on which we'll agree to file our papers.

11 THE COURT: Do you all have any needs of the  
12 Court transcript or anything of that nature before you?

13 MS. FEBUS: We discussed that. If we get it in  
14 time, that will be fantastic. I don't think we think it's  
15 necessary. And I think the Public Defender is going to go  
16 through the process of requesting an expedited one.

17 THE COURT: Let me see your calendar.

18 It's not an extensive written record as such, but  
19 there are other demands. Okay.

20 All right. Let me do this. I think two weeks from  
21 today will be the 27th --

22 MS. FEBUS: Yes.

23 THE COURT: -- of January. Okay. And what I'll  
24 do is I'll set it for the 27th **or** upon the date that the  
25 transcript is available, if it is approved to be, that the

1 government will file its closing argument, not to exceed  
2 20 pages, and then seven days thereafter, the -- what I am  
3 going to do is treat it as much as it would be like in the  
4 actual court, that is to let the government file its  
5 closing or its opening closing in the sense, first; then  
6 seven days thereafter, the defense will file its argument;  
7 and then the government, seven days later, will be able to  
8 file a rebuttal.

9 So that would be 20 pages for each on the main  
10 arguments; and ten pages limit on the rebuttal, for a  
11 seven day interval. All right.

12 MS. FEBUS: Thank you.

13 MR. FAKHIMI: Thank you, Your Honor.

14 THE COURT: So the anchor date is the 27th of  
15 January unless that needs to be extended due to the  
16 availability of an approved transcript.

17 Anything else?

18 MS. ROSEBERRY: Yes, Your Honor. We need to  
19 marshal the evidence. There were several items contained  
20 in the government's notebook that were not entered into  
21 evidence. Some were not tendered at all. Some were not  
22 mentioned in testimony.

23 THE COURT: All right. What I will normally do  
24 with that is give you all an opportunity to meet with the  
25 Clerk to see whether you agree as to what is in the

1 record. If you do, that closes the issue; if not, then I  
2 can resolve it. Okay.

3 I think I kept a pretty accurate record of what was  
4 tendered and what was admitted, but it certainly not all  
5 that was in the --

6 MS. ROSEBERRY: I did.

7 THE COURT: All right. Okay. You all let me  
8 know if you need -- if the Court needs to come back in or  
9 not. Otherwise, we'll suspend pending the closing  
10 arguments being filed.

11 All right. Thank you all very much.

12 (Recess)

13

**CERTIFICATE**

14

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE  
15 TRANSCRIPT OF THE PROCEEDINGS.

16

17

/s/ \_\_\_\_\_

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JANUARY 19, 2010

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